No. 17-1104

IN THE

Supreme Court of the United States

AIR AND LIQUID SYSTEMS CORP.
CBS CORPORATION, AND FOSTER WHEELER LLC,
Petitioners-Defendants,

v.

ROBERTA G. DEVRIES, ADMINISTRATRIX OF THE ESTATE OF JOHN B. DEVRIES, DECEASED, AND WIDOW IN HER OWN RIGHT,
Respondent.

INGERSOLL RAND COMPANY,
Petitioner-Defendant,

v.

SHIRLEY MCAFEE, EXECUTRIX OF THE ESTATE OF KENNETH MCAFEE, AND WIDOW IN HER OWN RIGHT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT GENERAL ELECTRIC IN SUPPORT OF PETITIONERS

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July 9, 2018

QUESTION PRESENTED

Whether products-liability defendants can be held liable under federal maritime law for injuries caused by products they did not make, sell, or distribute.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

General Electric Company ("GE"), was a defendant-appellee below, and is a respondent filing in support of petitioners in this proceeding pursuant to Supreme Court Rule 12.6. See Letter from C. Phillips, to S. Harris 1 (June 15, 2018). GE is a publicly traded company, and no publicly-owned company owns ten percent or more of GE's stock.

The petitioners, all of whom were defendants-appellees below, are:

1. Air & Liquid Systems Corp. is a wholly owned subsidiary of Ampco-Pittsburgh Corporation, a publicly traded corporation. It is the successor-by-merger to Buffalo Pumps, Inc.

2. CBS Corporation is a publicly traded company. National Amusements, Inc. and its wholly owned subsidiary, NAI Entertainment Holdings LLC, are privately held companies, which, in the aggregate, own the majority of the voting stock of CBS Corporation. To CBS Corporation's knowledge, no publicly held corporation owns 10 percent or more of the voting stock of CBS Corporation.

3. Foster Wheeler LLC is a wholly-owned indirect subsidiary of John Wood Group plc (Scotland), a publicly traded company. No known person or entity currently owns 10 percent or more of John Wood Group plc's (Scotland) publicly traded common stock.

4. The parent company for Ingersoll Rand Company is Ingersoll Rand PLC, a publicly traded corporation. No other publicly traded corporation owns more than 10 percent of Ingersoll Rand Company stock.

The respondents, who were the plaintiffs-appellants below, are:

1. Roberta DeVries, in her individual capacity and in her capacity as administratrix of the estate of John B. DeVries,

2. Shirley McAfee, executrix of the Estate of Kenneth McAfee, Deceased, and Widow in her own right.

The following parties were listed as either defendants or defendants-appellees on the Third Circuit's docket below. None of the following parties is a petitioner in this Court:

20th Century Gove Corp. of Texas

Allen Bradley Co.

Allen Sherman Hoff

American Optical

American Optical Corp.

AMTICO Division of American Biltrite

Aurora Pumps

AZRock Industries, Inc.

AO Smith Corp.

BF Goodrich Co.

Baltimore Ennis Land Co. Inc.

Bayer Cropscience Inc.

Borg Warner Corp.

Burnham LLC

BW/IP Inc.

Carrier Corp.

Certain Teed Corp.

Cleaver Brooks Inc.

Crane Co.

Crown Cork & Seal Co., Inc.

Federal Mogul Asbestos Personal Injury Trust

Gallagher Fluid Seals, Inc.

Goodyear Tire & Rubber Co.

Goulds Pumps, Inc.

Hajoca Corp.

Hampshire Industries, Inc.

IMO Industries, Inc.

J.A. Sexauer

J.H. France Refractories Co.

John Crane, Inc.

Metropolitan Life Insurance Co.

Minnesota Mining & Manufacturing Co.

McCord Gasket Co.

NOSROC Corporation

Oakfabco, Inc.

Owens-Illinois, Inc.

Parker Hannifin Corp.

Pecora Corp.

Peerless Industries, Inc.

Riley Stoker Corp.

Selby Battersby & Co.

Sid Harvey Mid Atlantic, Inc.

Thermal Engineering, Inc.

Trane U.S. Inc.

Warren Pumps, LLC

Weil McClain Division of the Marley Co.

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OPINIONS BELOW

The United States District Court for the Eastern District of Pennsylvania granted summary judgment to General Electric Company ("GE") in an unpublished order. See 2014 WL 6746806; Joint Appendix ("JA") 770-781. The United States Court of Appeals for the Third Circuit remanded in an unpublished order. Pet. App. 48a-52a. The district court again granted summary judgment, in an opinion published at 188 F. Supp. 3d 454 (E.D. Pa. 2016). Pet. App. 20a-42a. The Third Circuit reversed in an opinion published at 873 F.3d 232 (3d Cir. 2017). Pet. App. 1a-17a.

JURISDICTION

In 2012, John and Roberta DeVries (collectively, "Plaintiffs") sued 44 entities in Pennsylvania state court. Their case was removed to the Eastern District of Pennsylvania. That court had jurisdiction (i) pursuant to 28 U.S.C. § 1333(1) because the case arose from injuries that allegedly occurred aboard a vessel on navigable waters, and (ii) pursuant to 28 U.S.C. § 1442(a)(1) because several defendants, including GE, stated a federal common-law defense to claims arising from their alleged conduct as contractors for the United States Navy.

After the district court granted summary judgment to GE, Plaintiffs appealed to the Third Circuit. That court had jurisdiction under 28 U.S.C. § 1291, and decided the case on October 3, 2017. Pet. App. 1a-17a. This Court granted certiorari in this matter on May 14, 2018. On June 15, 2018, GE notified the Court of its intention to remain a party and to file briefs on the merits as a respondent in support of petitioners under Supreme Court Rule 12.6. See Letter from C. Phillips, to S. Harris 1 (June 15, 2018). This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitution provides that "[t]he judicial Power shall extend to . . . all Cases of admiralty and maritime Jurisdiction." U.S. Const. art. III, § 2, cl. 1. Section 1333 of Title 28 provides that "[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction."

STATEMENT OF THE CASE

The United States Navy built the destroyer *USS Turner* during the final months of World War II. Defendant GE was among the numerous companies that entered contracts with the Navy to supply equipment for the *Turner*. Pursuant to detailed military specifications, GE manufactured the steam turbines that served as the *Turner's* main engines and supplied shipboard electric power. In accordance with the Navy's requirements, GE delivered the turbines with no thermal insulation. Thereafter, the Navy's shipbuilder applied thermal insulation materials to certain external surfaces of the turbines after they were installed on the destroyer. More than a decade later, plaintiff John DeVries served as a Navy officer aboard the *Turner* from 1957 to 1960. Now, more than 70 years after GE manufactured the turbines for the *Turner*, Plaintiffs contend that GE is liable because DeVries was exposed to asbestos-containing materials at some point—including asbestos allegedly installed by the Navy on equipment on the *Turner*—which they allege caused him to contract lung cancer.

There is no dispute that DeVries was not exposed to asbestos manufactured, sold or distributed by GE. That should be the end of the inquiry. Maritime law does not support imposition of liability on a military

equipment supplier for harms allegedly caused by third-party products it did not make, sell or distribute. Extension of liability, based purely on a standard of foreseeability, contravenes settled maritime and tort law principles, is inconsistent with the objectives of simplicity and uniformity of maritime law, and would not promote sailor safety, but instead would result in substantial unfairness. Under existing standards, Plaintiffs are free to seek recovery against the manufacturers and distributors of the products that they allege caused them harm, including, if necessary, numerous bankruptcy trusts funded by asbestos manufacturers.

Expansion of liability in search of a "deep pocket" by focusing exclusively on potential foreseeability is especially unwarranted because the Navy *alone* was in charge of deciding the appropriate form of insulation on its ships as it balanced the risks and benefits to sailors aboard its vessels (along with hundreds of other risks from serving on a Naval warship). Retroactive imposition of a duty to warn on manufacturers would encourage them in the future to countermand and dilute the Navy's own warnings and policies. As such, extension of liability to manufacturers such as GE here would hobble the Navy's ability to protect the safety of its sailors by undercutting its universal, integrated command and control system.

A. Historical Background.

1. Before the United States entered World War II, President Franklin D. Roosevelt called upon American manufacturers to become "the great arsenal of democracy" to thwart Nazi efforts to "use the resources

of Europe to dominate the rest of the world."[1] President Roosevelt recognized:

> This nation is making a great effort to produce everything that is necessary in this emergency, and with all possible speed. . . .
>
> . . . Guns, planes, ships and many other things have to be built in the factories and the arsenals of America. . . .
>
> . . . So I appeal to the owners of plants, to the managers, to the workers, to our own government employees to put every ounce of effort into producing these munitions swiftly and without stint.

See Roosevelt, *supra*. In response, American industry mobilized and surged production to build "the most awesome military machine in history." Arthur Herman, *Freedom's Forge: How American Business Produced Victory In World War II*, at ix (2012). In the words of then-General Dwight D. Eisenhower: "Our enormous material superiority gave us an unchallengeable advantage over our foes. No army or navy was ever supported so generously or so well." J.A. Miller, *Men and Volts at War: The Story of General Electric in World War II*, at v (1947).

As part of its contribution to the war effort during World War II, GE supplied steam turbines under government contracts with the Navy in accordance with "Navy specifications [under] strict Navy control and supervision over all aspects of the turbines' design

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[1] President Franklin D. Roosevelt, The Great Arsenal of Democracy (Dec. 29, 1940), http://www.americanrhetoric.com/speeches/fdrarsenalofdemocracy.html.

and manufacture." DJA 113; see DJA 114-15.[2] As explained by retired Navy Captain Lawrence Stilwell Betts, M.D.: to further the Navy's essential mission to "maintain, train, and equip combat-ready Naval forces capable of winning wars," the Navy maintained a strict chain of command regarding all aspects of Naval operations, including responsibility for safety throughout the force. JA95-100 (Betts Decl. ¶¶ 9-13) (emphasis omitted). Maintaining strict adherence to this command structure, without interference from outside suppliers, was essential to the Navy's effective achievement of its mission. JA99-100 (*id.* ¶ 12).

2. The Navy "specified the types of thermal insulation and lagging for piping and machinery," including steam propulsion turbines on Navy vessels. JA106 (*id.* ¶ 17). The Navy required GE to supply turbines in bare-metal form without any insulation, asbestos or otherwise. *Id.* After the turbines were delivered to the Navy, external thermal insulation was provided "initially by the shipbuilder, and later upon maintenance or overhaul, [by] the Navy or shipyard/repair facility [performing the work]—in accordance with Navy specifications." *Id.*

Historically, the Navy viewed asbestos as an essential material to help contain the omnipresent danger of shipboard fire. Navy ships sail with tons of munitions, fuels, and other explosives. U.S. Navy, *The Bluejackets' Manual* 396-403 (16th ed. 1960) (ch. 23: Safety First) (discussing fire hazards aboard Navy ships). Asbestos was important to the Navy's efforts to limit fire risks and the immediate hazards those risks posed to sailors. As the federal judge presiding

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[2] "DJA" refers to the Joint Appendix filed in the initial *DeVries* appeal (No. 15-1278), that was before the Third Circuit when it issued the decision under review.

over the asbestos multi-district litigation ("MDL") has summarized, during WWII, "[t]he Navy became the country's largest consumer of asbestos, stockpiling and using it to prevent fires on the newly constructed combat vessels." Hon. Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?* 23 Widener L.J. 97, 102 (2013). The Navy's industrial hygienist during WWII explained that asbestos "became the preferred insulating material in Navy ships" because "it afforded heat protection to critical parts of the ship." See *Hearings on Compensation for Occupational Diseases: Hearing on H.R. 1626 and H.R. 3090 before the Subcomm. on Labor Standards of the H. Comm. on Education and Labor*, 99th Congress 353 (1985).

Moreover, the Navy's use of asbestos onboard ships "was not by chance, nor based on any requirements of the Navy's equipment manufacturers and vendors." JA103 (Betts Decl. ¶ 16). Instead, the Navy, through its total occupational health program, balanced the potential health risk of asbestos against the benefits of its critical properties as a lightweight and highly effective insulation material, and specified its use and safety precautions and warnings that accompanied any asbestos. JA194, 197-98, 201 (Betts Decl. ¶¶ 62, 67, 70-71). As the MDL court explained, "any thermal insulation materials, whether or not containing asbestos, were applied to GE products *after they were turned over to the Navy, and were supplied or installed by entities other than GE*"; "ultimately, the Navy exercised complete oversight over both the manufacture and safety testing phases of the process." *Hagen* v. *Benjamin Foster Co.*, 739 F. Supp. 2d 770, 772-86 (E.D. Pa. 2010) (Robreno, J.) (emphasis added).

Manufacturers such as GE had no control over what insulation the Navy would select or how it would be used with the turbines. JA106, 164-66, 208-09 (Betts Decl. ¶¶ 17, 46, 83). The Navy specified the insulation materials to be used. JA103-06 (*id.* ¶ 16). GE did not make, sell, install or specify the insulation that ended up on any particular turbine it sold to the Navy.

3. The Navy developed its own approach to mitigating asbestos-related risks in the face of emerging science about those risks. By 1940, the Navy "was a leader in the field of occupational medicine relating to, among other things, asbestos exposure." *Harris* v. *Rapid Am. Corp.*, 532 F. Supp. 2d 1001, 1006 (N.D. Ill. 2007). The Navy utilized its then-current knowledge of the science of asbestos exposure to provide "a robust and encompassing occupational health program." JA209 (Betts Decl. ¶ 83). In addition to dictating the insulation materials to be used in Navy ships, the Navy also promulgated detailed specifications regarding the form and content of safety warnings and instructions, including technical manuals and information plates to be displayed on shipboard equipment, provided by equipment manufacturers. JA204-05 (*id.* ¶ 76).

Equipment manufacturers' manuals had to be approved by the Bureau of Ships, and they "shall not be modified without [the] approval of the Bureau of Ships." JA249 (Senter Decl. ¶ 33). As a result, "[n]otes, cautions, and warnings should be used to emphasize important critical instructions . . . . [and] should be as sparing as is consistent with real need." JA250; see also JA202-03 (Betts Decl. ¶¶ 73-74). As explained by retired Navy Captain Joselyn C. Senter, CIH, an industrial hygienist who served as President of the Navy Industrial Hygiene Association: given the Navy's close oversight, it was "highly improbable" that

an equipment manufacturer would have been allowed to provide warnings regarding the use of materials that were redundant or inconsistent with the Navy's existing communications. JA250 (Senter Decl. ¶ 33).[3] Thus, the Navy strictly curtailed the safety information provided by third parties directly to sailors, and the U.S. military remained the leading authority on asbestos information and warnings. See also *Leite* v. *Crane Co.*, 749 F.3d 1117, 1123 (9th Cir. 2014) (discussing Navy's control over warnings); *Harris*, 532 F. Supp. 2d at 1005 (discussing that "the Navy dictated every aspect of . . . written documentation and warnings").

B. Proceedings Below.

1. This matter stems from claims by plaintiff Roberta DeVries that her deceased husband, John DeVries, contracted lung cancer caused by exposure more than half a century ago to asbestos-containing products during his service as an officer in the Navy on board the *USS Turner* from June 1, 1957 to June 1, 1960. DJA 87-88, 97-98, 242-45. Plaintiffs sued 44 companies, including GE, that manufactured and supplied equipment to the *Turner* pursuant to Navy specifications and oversight. DJA 87-98.

During his three years onboard the *Turner*, Mr. DeVries first served as a main propulsion assistant

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[3] A letter from Philip Drinker, Chief Health Consultant to the U.S. Maritime Commission, to Captain Thomas Carter of the U.S. Navy Department's Bureau of Medicine and Surgery, similarly "states that manufacturers who provided asbestos insulation to Bath Iron Works were willing to disseminate 'a brief statement of precautions which should be taken'" but that it was Dr. Drinker's understanding that "neither the Navy nor Maritime wants any change in the specifications as the performance with the present materials is entirely satisfactory." *Faddish* v. *Gen. Elec. Co.*, 2010 WL 4146108, at *8 (E.D. Pa. Oct. 20, 2010).

and was later promoted to engineering officer. JA331. In both roles, he supervised the work of seamen in the engine and fire rooms. JA333. He testified that there was a GE turbine in each engine room. JA271, 264, 778. But he was not present when the GE turbines were delivered to the *Turner*, and did not know who manufactured the external insulation, consisting of "blankets" and "mud," that he recalled seeing on the exterior of the GE turbines. JA260-62, 264. Nor did he know who specified or supplied any initial or replacement insulation on GE turbines—or whether that insulation even contained asbestos. JA259.

GE filed a motion for summary judgment under the so-called "bare-metal rule," pursuant to which companies that manufacture and sell equipment are not liable for injuries caused by third-party asbestos added to their equipment after it leaves their control. JA777; see also DJA 257-59. GE also contended that there was insufficient evidence in the record to establish causation with respect to any GE product under maritime law. JA771; see also DJA 256-57. Finally, GE contended that the government-contractor defense barred Plaintiffs' claims because (1) the Navy controlled all design and warning specifications for equipment and insulation on its ships, (2) GE complied with Navy specifications regarding warnings in supplying equipment under Navy contracts, and (3) the Navy had superior knowledge about the hazards of asbestos and therefore GE had no duty to warn the Navy about such hazards. JA777; see also DJA 259-67. Plaintiffs' theory was that, notwithstanding the Navy's asbestos management and hazard communication system, GE should have attached to the turbines it manufactured in 1944 a warning about the alleged dangers of the Navy's asbestos insulation materials that would have been permitted by the Navy

and seen and heeded by Mr. DeVries while aboard the *Turner*.

The United States District Court for the Eastern District of Pennsylvania granted GE's motion. JA770-81. The court held that maritime law applied because the injuries allegedly occurred aboard a Navy warship, *the Turner*. JA774-75. And, relying on its earlier decision in *Conner* v. *Alfa Laval, Inc.*, 842 F. Supp. 2d 791, 801 (E.D. Pa. 2012), the court held that "a manufacturer has no liability for harms caused by—and no duty to warn about hazards associated with—a product it did not manufacture or distribute." JA775. Because there was "no evidence that GE manufactured or supplied the insulation to which Plaintiff was exposed," JA779, the district court awarded summary judgment to GE, see JA780 ("no reasonable jury could conclude from the evidence that Plaintiff was exposed to asbestos from a product manufactured or supplied by Defendant").

2. On appeal, the United States Court of Appeals for the Third Circuit remanded in an unpublished order. Pet. App. 48a-52a. The Court noted that *Conner*—the decision on which the district court relied—appeared to apply the "bare metal" rule to claims sounding in both strict liability and negligence, but "the opinions in this case contain no specific reference to negligence." *Id.* at 50a. Accordingly, the Third Circuit remanded with instructions that the district court clarify whether its ruling applies to negligence claims. *Id.* at 51a. The court further asked the lower court to consider whether maritime law imposes liability in negligence for third-party asbestos products when: "(1) the defendant's product requires asbestos components to function"; "(2) the defendant affirmatively specifies that asbestos components and replacement parts be used"; "(3) the defendant 'knew'

that the customer would use asbestos parts with its product"; or "(4) the defendant intended that the product be used with asbestos." *Id.* at 50a-51a.

3. On remand, the district court again granted summary judgment. Pet. App. 20a-42a. The court confirmed that it had previously considered Plaintiffs' negligence claims before awarding petitioners summary judgment, and that under maritime law the "bare metal" rule applies to negligence claims, including negligent failure to warn. *Id.* at 42a. Highlighting the importance of uniformity and predictability in maritime law, the court explained that maritime law does not impose liability for harms caused by third-party products, see *id.* at 29a-33a, 37a-42a & n.18, and that a plaintiff cannot prevail without establishing that a defendant manufactured or supplied the product that caused his injuries, *id.* at 36a-37a. Thus, under this "bright-line rule regarding the 'product(s)' for which a product manufacturer can be liable," a plaintiff must establish "exposure to asbestos from the defendant's own 'product' in order to maintain either a negligence or strict liability claim." *Id.* at 37a. This rule is unaffected, the court further concluded, by any of the "circumstances or exceptions identified" by the Third Circuit in its remand order. *Id.* The district court thus re-affirmed summary judgment for GE on all claims. *Id.* at 42a.

4. The Third Circuit reversed and remanded, holding that manufacturers can be liable in negligence for injuries caused by third-party asbestos when those injuries are reasonably foreseeable. Pet. App. 1a-17a. According to the Third Circuit, "[w]hen parties debate the bare-metal defense, they debate when and whether a manufacturer could reasonably foresee that its actions or omissions would cause the plaintiff's asbestos-related injuries." *Id.* at 7a-8a. In the court's

view, this left it two choices: it could adopt a bright-line rule and decide that such injuries are never foreseeable—and so a "manufacturer of a bare-metal product is never liable for injuries caused by later-added asbestos-containing materials," *id.* at 5a—or it could instead adopt a fact-specific standard that turned on whether such injuries are foreseeable. *Id.* at 8a, 10a. The court acknowledged the "familiar tradeoffs" between rules and standards, including that a "standard-based approach is bound to be less predictable and less efficient," but would do a better job ensuring that sailors are not denied compensation. *Id.* at 10a, 12a.

The Third Circuit chose the standard-based approach because "maritime law is deeply concerned with the protection of sailors," Pet. App. 12a, and a standard that depended on foreseeability would permit "a greater number of deserving sailors to receive compensation," *id.* at 13a. The court acknowledged that other principles inform the choice of legal standards in maritime law, including "traditions of simplicity and practicality," "uniform rules," and the "protection of maritime commerce." *Id.* at 13a-14a. But, it concluded that none of these principles "weigh[ed] heavily in either direction," and so the "special solicitude for the safety and protection of sailors is dispositive." *Id.* at 15a.

Accordingly, the Third Circuit held that a "manufacturer of a bare-metal product may be held liable for a plaintiff's injuries suffered from later-added asbestos-containing materials if the facts show the plaintiff's injuries were a reasonably foreseeable result of the manufacturer's" conduct. Pet. App. 15a. "[F]or example," the court noted, "a bare-metal manufacturer may be subject to liability if it

reasonably could have known, at the time it placed its product into the stream of commerce, that:"

> (1) asbestos is hazardous, and
>
> (2) its product will be used with an asbestos containing part, because
>
> > (a) the product was originally equipped with an asbestos containing part that could reasonably be expected to be replaced over the product's lifetime,
> >
> > (b) the manufacturer specifically directed that the product be used with an asbestos-containing part, or
> >
> > (c) the product required an asbestos-containing part to function properly.

Id. at 15a-16a (footnotes omitted). The court emphasized that these "may or may not be the only facts on which liability can arise," and that the "finer contours of the" bare-metal rule and "how it should be applied . . . must be decided on a case-by-case basis." *Id.* at 16a.

SUMMARY OF ARGUMENT

Federal maritime law does not support the imposition of liability against manufacturers that neither manufactured, sold, nor distributed the product alleged to cause injury to a plaintiff. GE, which manufactured turbines pursuant to detailed specifications for installation aboard Navy warships, should not face liability more than 70 years after delivering turbines to the Navy based upon plaintiff's alleged exposure to asbestos-products manufactured, sold, and applied to the equipment by third parties. Federal maritime law does not support this unprecedented expansion of liability, which would undermine the core purpose of maritime law—to

protect maritime commerce through simple and predictable rules—and would contravene basic principles of tort law, while leading to a whole host of absurd and anomalous results.

Bedrock tort principles and longstanding products liability decisions inside and outside the maritime context limit a manufacturer's liability to the products it places into the stream of commerce. This limitation on liability protects maritime commerce by prescribing simple, predictable rules that generate consistent results. A rule restricting a manufacturer's liability to harm caused by its own products is practical and predictable; each manufacturer is responsible for its own products, and not responsible for warning about an inherently unknown and unlimited group of third-party products that it did not make, sell or distribute over a multi-decade period. Such a rule is all the more necessary in this context where the Navy exercised plenary control over all shipboard products—including the use of asbestos—and the warnings provided to its sailors. Further, any retroactively imposed duty to warn would run headlong into the Navy's informed and binding judgments about how best to balance and manage risks in dangerous settings.

By contrast, the Third Circuit's inherently squishy foreseeability standard undermines the goals of maritime law. The standard is neither simple nor predictable. As the experience of courts who have already attempted—and failed—to fashion a workable standard to impose liability on manufacturers for third-party parts has shown, the Third Circuit's standard necessarily will lead to unpredictable and contradictory results. Indeed, the linchpin of the Third Circuit's standard—"foreseeability"—has been rejected by this Court as "an inadequate brake" on potential limitless liability that would be inimical to

maritime commerce. *E. River S.S. Corp.* v. *Transamerica Delaval, Inc.*, 476 U.S. 858, 874 (1986). The Third Circuit's standard would threaten manufacturers with "vast" and arbitrary liability not just for asbestos products they did not manufacture, but also for other potentially hazardous products that might be used with theirs in the future. Such a dramatic expansion of liability, which upends carefully considered policy judgments and converts manufacturers into the insurers of injuries they did not cause and could not have prevented, if adopted at all, should be done prospectively, and by Congress.

The Third Circuit's primary justification for its standard—solicitude for the safety of sailors by providing some of them with access to a deep pocket—does not support its holding. Rather, expansion of potential liability would usher in the proliferation of duplicative and contradictory information that would dilute the effectiveness of the warnings sailors already receive from the Navy, thereby diminishing sailor safety. In short, the dramatic deviation from traditional tort and maritime principles in this case would impose substantial retroactive liability based on conduct occurring over 70 years ago, which manufacturers like GE could not have imagined much less mitigated. And the substantial unfairness of this destruction of settled expectations is compounded by the shifting of liability *away* from those actually responsible for causing the asbestos-related injury.

ARGUMENT

I. MARITIME LAW DOES NOT SUPPORT LIABILITY AGAINST MILITARY SUPPLIERS THAT NEITHER MANUFACTURED, SUPPLIED NOR SOLD THE PRODUCT ALLEGED TO HAVE CAUSED INJURY.

A. Maritime Law Seeks To Protect Maritime Commerce Through Standards That Are Simple, Practical And Ensure "Uniform Rules Of Conduct."

The Constitution provides that the judicial power shall extend to "all Cases of admiralty and maritime Jurisdiction." U.S. Const. art. III, § 2, cl. 1. In turn, Congress granted federal district courts original jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction." 28 U.S.C. § 1333(1). Federal courts apply federal common law to cases within their admiralty and maritime jurisdiction. *Norfolk S. Ry.* v. *Kirby*, 543 U.S. 14, 23 (2004). In doing so, courts look to the "purpose of the grant" of admiralty and maritime jurisdiction to determine its boundaries; namely, "the fundamental interest giving rise to maritime jurisdiction is the 'protection of maritime commerce.'" *Exxon Corp.* v. *Cent. Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991) (quoting *Sisson* v. *Ruby*, 497 U.S. 358, 367 (1990)); see *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 544 (1995).

As this Court has explained, the "federal interest in protecting maritime commerce" can "be fully vindicated only if all operators of vessels on navigable waters are subject to uniform rules of conduct," even those not directly engaged in commercial maritime activity. *Foremost Ins. Co.* v. *Richardson*, 457 U.S. 668, 674-75 (1982) (emphasis omitted); see *Romero* v. *Int'l Terminal Operating Co.*, 358 U.S. 354, 373 (1959)

("[S]tate law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system."). As a result, the principal hallmarks of maritime law are its "traditions of simplicity and practicality." *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U.S. 625, 631 (1959).

Exercising that authority, this Court has held, for example, that maritime law supports a claim for wrongful death "caused by violation of maritime duties." *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 390, 409 (1970). The Court ruled that the "recognition of a right to recover for wrongful death . . . will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts." *Id.* at 401. The *Moragne* Court stressed that its adoption of this uniform standard would (i) "supplant the present disarray in this area with a rule both simpler and more just" and (ii) "not impede[] efficiency in adjudication." *Id.* at 405.

At the same time, this Court has limited the recovery available in wrongful death actions under maritime law. *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 37 (1990). Indeed, notwithstanding that "admiralty courts have always shown special solicitude for the welfare of seamen and their families," the Court reasoned that it was not "free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them." *Id.* at 36. Rather, "an admiralty court should look primarily to [federal and state] legislative enactments for policy guidance," *id.* at 27, because federal courts "sail in occupied waters," and thus are constrained by statutes that courts "cannot exceed." *Id.* at 36; see also *Atl.*

Sounding Co. v. *Townsend*, 557 U.S. 404, 420 (2009) ("The reasoning of *Miles* remains sound.").

Likewise, this Court has accepted "products liability, including strict liability, as part of the general maritime law." *E. River S.S.*, 476 U.S. at 865. In *East River Steamship*, the Court expressly embraced prior decisions by the courts of appeals, sitting in admiralty, that "overwhelmingly ha[d] adopted concepts of products liability." *Id.* At the same time, the Court adopted a bright-line limitation whereby "no products-liability claim lies in admiralty when the only injury claimed is economic loss." *Id.* at 876. The Court rejected competing rules accepted by various states because authorizing a claim for purely economic damages in tort "could subject the manufacturer to damages of an indefinite amount." *Id.* at 874. Specifically, the Court emphasized that in products-liability actions, the legal requirement of "foreseeability is an inadequate brake" on potential liability, and therefore "[p]ermitting recovery for all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums." *Id.*

As discussed below, these core principles underlying the purpose of maritime law dictate that it does not impose a duty on a manufacturer with respect to a product that it neither manufactured, sold, nor distributed.

B. Maritime Law Does Not Permit Liability Against Manufacturers That Neither Made, Sold, Nor Distributed The Product That Allegedly Caused Plaintiffs Harm.

1. "A fundamental principle of traditional products liability law is that the plaintiff must prove that the defendant manufacturer made the product which caused the injury." 63 Am. Jur. 2d *Products*

Liability § 157 (2018). As explained in the *Restatement (Second) of Torts*, persons that manufacture, supply or sell a chattel are subject to liability under negligence principles for "physical harm caused by the use of the chattel." *Restatement (Second) of Torts* § 388 (1965) (principles applying to all suppliers); see *id.* §§ 394-398 (principles applicable to manufacturers); *id.* §§ 399-402 (principles applicable to sellers); see also *Restatement (Third) of Torts: Prods. Liab.* § 1 (1998) ("One . . . who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect."). See Annotation, *Products Liability: Necessity and Sufficiency of Identification of Defendant as Manufacturer or Seller of Product Alleged to Have Caused Injury*, 51 A.L.R.3d 1344, § 2[a] (1973) ("[T]o hold a producer, manufacturer, or seller liable for injury caused by a particular product, there must first be proof that the defendant produced, manufactured, sold, or was in some way responsible for the product . . . .").

Federal and state courts have applied that threshold limitation for decades. Thus, in *Baughman* v. *General Motors Corp.*, the Fourth Circuit held that a defendant could not be held liable for injuries caused by an allegedly defective component part produced by a third party where defendant "did not incorporate the defective component part into its finished product and did not place the defective component into the stream of commerce." 780 F.2d 1131, 1132-33 (4th Cir. 1986). In that circumstance, the traditional rationales for imposing liability were absent because the "manufacturer has not had an opportunity to test, evaluate, and inspect the component; it has derived no benefit from its sale; and it has not represented to the

public that the component part is its own." *Id.* at 1133.[4]

2. For years, these principles likewise have been applied to actions involving plaintiffs alleging injury from exposure to asbestos. In *O'Neil* v. *Crane Co.*, the California Supreme Court held that manufacturers of valves and pumps used on a Naval aircraft carrier could not be held liable for injuries allegedly caused by "asbestos released from external insulation and internal gaskets and packing, all of which were made by third parties and added to the pumps and valves postsale." 266 P.3d 987, 991 (Cal. 2012). The *O'Neil* Court rejected the suggestion that defendants were liable "because it was foreseeable workers would be exposed to and harmed by the asbestos in replacement parts and products used in conjunction with their pumps and valves." *Id.* The Court explained that the "broad rule plaintiffs urge"—*i.e.*, requiring "manufacturers to warn about the dangerous propensities of products they do not design, make, or

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[4] *See also Braswell* v. *Cincinnati Inc.*, 731 F.3d 1081, 1091 (10th Cir. 2013) ("[A]n otherwise safe product is not made unreasonably dangerous if the manufacturer fails to prevent the replacement of a part with a substandard aftermarket part"); *In re Deep Vein Thrombosis*, 356 F. Supp. 2d 1055, 1068 (N.D. Cal. 2005) ("[N]o case law . . . supports the idea that a manufacturer, after selling a completed product to a purchaser, remains under a duty to warn the purchaser of potentially defective additional pieces of equipment that the purchaser may or may not use to complement the product bought from the manufacturer."); *Christian* v. *Minn. Mining & Mfg. Co.*, 126 F. Supp. 2d 951, 958 (D. Md. 2001) ("[Defendant] did not owe Plaintiffs a duty to warn because [it] neither manufactured [n]or supplied Plaintiffs' breast implants"); *Firestone Steel Prods. Co.* v. *Barajas*, 927 S.W.2d 608, 615-16 (Tex. 1996) ("A manufacturer does not have a duty to warn or instruct about another manufacturer's products, though those products might be used in connection with the manufacturer's own products.").

sell"—would "represent an unprecedented expansion of strict products liability" but would not "further the purposes of strict liability" or "public policy." *Id.*; see *Simonetta* v. *Viad Corp.*, 197 P.3d 127, 138 (Wash. 2008) (en banc) (where "[defendant] sold the evaporator without insulation" and "did not manufacture, sell, or select the asbestos insulation" it "was not in the chain of distribution of the dangerous product" and " had no duty to warn under negligence").

3. Federal courts have applied these principles to cases involving asbestos under maritime law and state common law. In *Lindstrom* v. *A-C Product Liability Trust*, 424 F.3d 488 (6th Cir. 2005), the court held that maritime law does not impose liability on a manufacturer for asbestos-containing components and replacement parts that it did not manufacture or distribute. *Id.* at 495. There, the plaintiff asserted claims under strict liability and negligence, alleging that he was exposed to asbestos while replacing gaskets on pumps manufactured by a third party. *Id.* at 496. The court held that the manufacturer of the pump "cannot be held responsible for the asbestos contained in another product." *Id.* The Sixth Circuit explained that an equipment manufacturer "cannot be held responsible" merely because asbestos-containing materials were "attached or connected" to its equipment after sale. *Id.* at 495; see *Stark* v. *Armstrong World Indus., Inc.*, 21 F. App'x 371, 381 (6th Cir. 2001) (rejecting claim that ship turbine and boiler manufacturers should be held liable because their equipment "is integrated into the rest of the machinery of the vessel, much of which uses and may release asbestos," observing that "[t]his form of guilt by association has no support in the law of products liability").

4. This longstanding limitation on liability in the maritime context reflects a recognition that the doctrine advances the fundamental objective of maritime law: the protection and promotion of maritime commerce through simple, predictable, and uniform rules. Prescribing a bright-line rule for liability based on an easily-knowable fact—that is, whether the defendant manufactured, sold or distributed the product that allegedly harmed the plaintiff—furthers maritime law's objective for "simplicity and practicality," *Kermarec*, 358 U.S. at 631, while generating predictable results that allow parties to plan and transact accordingly.

By restricting a manufacturer's liability to harm caused by its own products, the doctrine places responsibility squarely on the party that benefitted from the commerce in question. Each manufacturer is responsible for its own products, and not for an inherently unknowable and unlimited group of third-party products over a multi-decade period over which the manufacturer had no control. In contrast, restricting liability to defendants that manufacture, sell or distribute the product alleged to have caused injury furthers maritime law's policy of simple, practical, knowable rules. See *Foremost Ins.*, 457 U.S. at 675.

C. Expansion Of Liability Is Particularly Unwarranted In Maritime Cases Where The Navy Exercised Plenary Control Over Shipboard Products And Warnings.

Imposing a duty on manufacturers to warn about the potential hazards of asbestos products that the defendant manufacturer did not make, supply, or distribute would be especially improper in the military setting, where the Navy exercised plenary authority over the use and control of asbestos for its warships.

1. The Navy had sophisticated knowledge about asbestos, promulgated its own safety orders and warnings about asbestos, and took measures to reduce asbestos exposure while balancing other military priorities. JA194, 197-201 (Betts Decl. ¶¶ 62, 67, 69-71). Retroactively imposing a broad duty to warn on a military supplier in this setting would run headlong into the informed and authoritative judgments made by the United States Navy for decades about which products were best suited for accomplishing its military objectives and how best to balance and manage the risks posed by those products. See, *e.g.*, *Smith* v. *Walter C. Best, Inc.*, 927 F.2d 736, 740-41 (3d Cir. 1990) (no duty to warn owed by supplier of silica sand to employee user, given that the employer "was a knowledgeable industrial purchaser of silica sand, familiar with the dangers associated with inhaling silica dust"); *Akin* v. *Ashland Chem. Co.*, 156 F.3d 1030, 1037 (10th Cir. 1998) (chemical manufacturer had no duty to warn Air Force or its employees of risk of certain chemical exposure because the Air Force "should have known the risks involved" and was "deemed to possess the necessary level of sophistication").

As with all substances, the Navy's knowledge about asbestos hazards evolved over time, but its knowledge of and control measures regarding those risks was state-of-the-art. See JA96-166, 172-73, 193-94, 199-200 (Betts Decl. ¶¶ 8-47, 49, 61, 69); JA250-51, 254-58 (Senter Decl. ¶¶ 34-35, 40-47). The Navy utilized its knowledge to provide extensive controls and warnings to personnel as it deemed appropriate.[5] The Navy's

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[5] As early as 1939, Captain H.E. Jenkins, Manager of the Navy Yard in Boston, recommended that dust respirator and gloves be worn to supplement the practice of wetting down insulating materials, and commented on the impracticality of respirators

recognition of these dangers and provision of mitigation and warning measures continued throughout the 1940s. JA120-38 (Betts Decl. ¶¶ 24-32).[6]

The Navy continued to warn about the hazards of asbestos insulation and to prescribe procedures for minimizing asbestos exposure throughout the 1950s and 1960s, including the time of Mr. DeVries's service on the *USS Turner*. For example, on January 7, 1958, the Navy issued a "Safety Handbook for Pipefitters," which contained the following warning: "Asbestos dust is injurious if inhaled. Wear an approved dust respirator for protection against this hazard." JA237 (Senter Decl. ¶ 18) (emphasis omitted); JA137 (Betts Decl. ¶ 31) (same). Navy "[s]hipyards, especially during the [l]ate 1950s and into the 1960s, were under heavy scrutiny to comply with established procedures for handling asbestos insulation." JA251-52 (Senter Decl. ¶ 36); see JA137-39 (Betts Decl. ¶¶ 32-33).

2. Moreover, it is difficult to imagine how Navy contractors could have told the Navy or Navy sailors anything new about some third party's asbestos that

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during shipboard operations. JA118-20 (Betts Decl. ¶¶ 22-23). Captain E.W. Brown, recognized as the founder of the Navy's formal occupational health program, noted material wetting methods, exhaust ventilation, and respirator use at the New York Navy Yard in the 1941 Annual Report of the Surgeon General, US Navy to the Secretary of the Navy. JA118 (Betts Decl. ¶ 22).

[6] The Navy and the Maritime Commission jointly issued "[m]inimum [r]equirements" for working with asbestos, advising that such jobs "can be done safely with: 1. Segregation of dusty work, and 2. (a) Special ventilation" or "(b) Wearing of special respirators," and "(3) Periodic medical examination." JA120-21 (Betts Decl. ¶ 24) (citing Navy Dep't & Maritime Comm'n, *Minimum Requirements for Safety and Industrial Health in Contract Shipyards* (1943)).

would have materially altered their behavior and prevented injury.

To the contrary, the Navy's control over supplied parts "included the decision of what warnings should or should not be included." *Faddish* v. *Gen. Elec. Co.*, 2010 WL 4146108, at *7 (E.D. Pa. Oct. 20, 2010). "[U]nless expressly directed to do so by the Navy, GE was not permitted, under the specifications, associated regulations and procedures, and the actual practice as it existed in the field, to affix any type of warning to a Navy turbine that addressed alleged hazards of products." *Id.* (alteration in original). As Captain Betts explained, the Navy had "state-of-the-art" knowledge about the emerging hazards of asbestos far exceeding what an individual manufacturer could accumulate. JA96-166, 172-73, 193-94, 199-200 (Betts Decl. ¶¶ 8-47, 49, 61, 69). The Navy also had a "robust and encompassing" occupational health program that balanced military priorities with efforts at "controlling untoward exposure to airborne asbestos fibers to all Naval and civilian personnel." JA197, 209 (Betts Decl. ¶¶ 67, 83); see also JA250-51, 254-58 (Senter Decl. ¶¶ 34-35, 40-47).

In this setting, an equipment supplier, such as GE, "had absolutely no authority, responsibility, or control over the US Navy" with respect to hazard communications or controls. JA164, 208-09 (Betts Decl. ¶¶ 46, 83); see also JA250, 257-58 (Senter Decl. ¶¶ 33, 47) ("[I]t is highly improbable that unsolicited and gratuitous warnings regarding the use of materials made by commercial vendors would be allowed, especially if they were redundant and/or inconsistent with the Navy's existing communications in this regard."). Indeed, even equipment technical manuals and information plates to be placed on shipboard equipment were subject to detailed Navy

specifications. JA123-26, 137-40, 202-05 (Betts Decl. ¶¶ 27, 31-34, 73-74, 76).

II. THE DECISION BELOW IS CONTRARY TO CORE PRINCIPLES OF MARITIME LAW.

A. The Decision Below Introduces Needless Complexity And Promotes Anomalous Results.

In direct violation of the core principles of maritime law, the Third Circuit crafted a complex, indeterminate, multi-factor standard designed to extend liability to manufacturers for injuries caused by asbestos that they neither manufactured, sold, nor distributed and that was added to their products by third-parties not under its control. Under the Third Circuit's test, "foreseeability is the touchstone," and "a manufacturer of a bare-metal product may be held liable for a plaintiff's injuries suffered from later-added asbestos-containing materials if the facts show the plaintiff's injuries were a reasonably foreseeable result of the manufacturer's failure to provide a reasonable and adequate warning." Pet. App. 15a. To assess liability, courts are advised to ask, *inter alia*, whether the defendant "reasonably could have known" that its "product required an asbestos-containing part to function properly," or "was originally equipped with an asbestos containing part that could reasonably be expected to be replaced over the product's lifetime." *Id.* at 15a-16a. Far from advancing the "simplicity and practicality," *Kermarec*, 358 U.S. at 631, that maritime law demands, the standard thwarts those goals by increasing complexity and uncertainty and leads inevitably to inconsistent and absurd results.

1. As an initial matter, the court below effectively acknowledged that its standard would inject increased complexity, explaining that "the standard-based

approach is bound to be less predictable and less efficient." Pet. App. 12a. And that is pure understatement, as the speculative inquiry that courts are instructed to undertake inevitably will lead to more questions than answers and promote conflicting resolutions by factfinders in factually similar cases.

At base, this is because foreseeability presents a malleable standard for fixing liability. See, *e.g.*, *La. ex rel. Guste* v. *M/V TESTBANK*, 752 F.2d 1019, 1025 (5th Cir. 1985) (en banc) ("pragmatic limitations on the doctrine of foreseeability are both desirable and necessary"); *Clohessy* v. *Bachelor*, 675 A.2d 852, 862–63 (Conn. 1996) ("specific limitations must be imposed upon the reasonable foreseeability rule"). There are, after all, greater and lesser degrees of foreseeability, and presumably the court intended that some but not others would suffice for liability. But identifying just exactly *how* foreseeable the buyer's use of a particular third-party product with the defendant's product must be to trigger liability will lead to multifarious and divergent answers.

2. The Third Circuit's proffered "standard" underscores the disconnect between its freewheeling approach and controlling principles of maritime law. For example, the Third Circuit's suggestion that the use of a third-party product may be foreseeable where it is "required [for the other] part to function properly" simply begs the question.

What is the product's "necessary function" depends almost entirely on the "eye of the beholder." How should a trier of fact decide whether asbestos insulation (as opposed to some other insulation) is thus "necessary" to the operation of the turbines. And from whose perspective is necessity judged—GE's, the Navy's, or a plaintiff's? And when? When the turbine was shipped to the Navy? More than a decade later,

when DeVries was on the *Turner*? Every time the turbines are overhauled or serviced? These imponderables render the Third Circuit's test incapable of a uniform application even on a single ship, much less across all of maritime commerce.

Moreover, necessity is not at all a static concept and thus likely will change over time, particularly over decades. Thus, a product may cease to be "required" and instead become unnecessary through advances in technology. There would be no way for a manufacturer to evaluate whether this might occur, particularly gazing well into the future, much less whether a buyer might nonetheless continue the use of the previously "required" product instead of abandoning it in favor of safer alternatives. In short, the Third Circuit's test presents courts with an impossible task that will only further "produce[] confusion and conflict." *Kermarec*, 358 U.S. at 631.

3. Further, the Third Circuit's standard is not only indeterminate but also merely illustrative and admittedly incomplete. As its standard, the court below presents an "example," Pet. App. 15a, of certain factors that "may or may not be" exclusive, and notes that "[t]he finer contours" of when a manufacturer may be subject to liability for injuries caused by another company's product, as "applied to various sets of facts, must be decided on a case-by-case basis," *id.* at 16a. Layering uncertainty on top of uncertainty, this "example" standard would further exacerbate the speculative and arbitrary nature of the inquiry, and is precisely the kind of test this Court has explicitly disfavored in admiralty cases as "hard to apply, jettisoning relative predictability for the open-ended rough-and-tumble of factors, inviting complex argument in a trial court and a virtually inevitable appeal." *Jerome B. Grubart*, 513 U.S. at 547.

Notably, even the "example," Pet. App. 15a-16a, factors that the court supplies as its test are themselves cobbled together from the disparate approaches of courts that have already struggled—and failed—to articulate a clear, consistent and workable standard to impose liability on manufacturers for third-party parts. Indeed, courts that have previously adopted a foreseeability-based rule have instead taken a wide variety of differing approaches. See *Schwartz* v. *Abex Corp.*, 106 F. Supp. 3d 626, 644-48 (E.D. Pa. 2015) (surveying cases and finding "no clear majority rule"). Thus, even the "already-decided precedents" that the Third Circuit relied upon do not agree on a clear standard, disagree with one another on specifics, and are impossible to apply in a consistent manner.

For example, *Quirin* v. *Lorillard Tobacco Co.*, 17 F. Supp. 3d 760 (N.D. Ill. 2014), held that an equipment supplier has a duty to warn about the hazards of asbestos exposure that "was not just foreseeable, but inevitable," because the manufacturer "designed its products to be used with asbestos-containing materials" and its products "needed asbestos-containing components to function properly." *Id.* at 770-71. *Quirin* itself had resulted in considerable confusion as courts applied a range of inconsistent and unclear approaches.

Some courts found that a manufacturer-defendant could be responsible for a third-party's asbestos if the manufacturer "specified" use of asbestos materials. See *McAlvey* v. *Atlas Copco Compressors, LLC*, 2015 WL 5118138 (S.D. Ill. Aug. 28, 2015) (extending duty to warn to pump manufacturer where pump's manual specified the use of asbestos-containing materials with the pumps); *Neureuther* v. *CBS Corp.*, 2015 WL 5076939, at *1 (S.D. Ill. Aug. 27, 2015) (extending duty to warn to boiler manufacturer where asbestos-

containing components were "essential to the function" of the boiler). Other courts, without considering the manufacturer's specifications, found potential liability where the asbestos component was deemed necessary to the equipment's functions. See *Kochera* v. *Foster Wheeler, LLC*, 2015 WL 5584749, at *3-4 (S.D. Ill. Sept. 23, 2015) (extending duty to warn to turbine manufacturer because there was evidence the turbines "required asbestos-containing components to function properly"); *Greenleaf* v. *Atlas Copco Compressors, LLC*, 2015 WL 12559915, at *4 (S.D. Ill. Sept. 25, 2015) (similar). Still others, such as *Bell* v. *Foster Wheeler Energy Corp.*, 2016 WL 5780104 (E.D. La. Oct. 4, 2016), another case the court below draws on for its non-exclusive, laundry-list of factors, *rejected Quirin* and any "one-size-fits-all" approach, and suggested a "more granular" standard. *Id.* at *6.

Unsurprisingly, these efforts to determine liability when the use of a particular part was, among other things, specified or required, has spawned inconsistent and contradictory results. This cacophony of approaches is the antithesis of straightforward, practical, and uniform rules that maritime law demands. Worse still, the Third Circuit's open-ended incorporation of many of these conflicting approaches into its test recognizes that "liability can arise" in yet other ways. Pet. App. 16a.

4. Finally, by imposing liability on manufacturers for third-party products they did not manufacture, distribute or sell, the Third Circuit's expansive rule holds manufacturers responsible for harms they did not cause. Basic tort principles place liability with entities that are actually responsible for the injury-causing product—that made and sold it and proximately caused the resultant injury—because to do otherwise would be "unjust and inefficient."

Restatement (Third) of Torts: Prods. Liab., *supra*, § 5 cmt. a; see *supra* at 18-22. The party responsible for the injury-causing product is the party that manufactured or supplied it, after all, not an unrelated entity that has no control over the product and consequently does not control the risk. Making manufacturers responsible for third-party products where only the manufacturer of the injury-causing product is in a position to ensure and improve its safety thus defies fairness and logic, and serves to undermine the fundamental interest of maritime law to promote maritime commerce through simple, uniform rules that generate consistent results. Uncertain liability inevitably would cause manufacturers and suppliers to seek non-maritime markets that are more predictable.

B. The Decision Below Is Impractical And Undermines The Safety Of Sailors.

The result of the Third Circuit's rule is to expose manufacturers to potentially unlimited liability without any corresponding benefit for the safety of sailors.

1. The unpredictability of the Third Circuit's elusive foreseeability standard threatens manufacturers with "vast" and limitless liability. *E. River S.S.*, 476 U.S. at 874 ("In products-liability law, where there is a duty to the public generally, foreseeability is an inadequate brake."); see *Stockton* v. *Ford Motor Co.*, 2017 WL 2021760, at *14 (Tenn. Ct. App. May 12, 2017) (noting that foreseeability "remains an elusive and indefinite concept"). Under that standard, there is no determinate way for manufacturers to predict or avoid liability, as the experience of courts that have already tried and failed to develop a workable standard to cabin potential liability confirms. See *supra* at 29-30. To the contrary,

the test is "too indeterminate to enable manufacturers easily to structure their business behavior," *E. River S.S.*, 476 U.S. at 870, exposing them to liability for all the countless foreseeable ways in which their products may interact with innumerable harmful third-party products in the future. In this way, foreseeability-based liability "would make all manufacturers the guarantors not only of their *own* products, but also of each and every product that could conceivably be used in connection with or in the vicinity of their product." John W. Petereit, *The Duty Problem With Liability Claims Against One Manufacturer for Failing to Warn About Another Manufacturer's Product*, HarrisMartin Columns: Asbestos, Aug. 2005, at 4.

Moreover, the logic of the Third Circuit's rule extends far beyond the asbestos context. Not only would each equipment manufacturer that supplies a product that could be used with third-party products containing asbestos be required to provide separate warnings, but *every* manufacturer whose product could be used in conjunction with *any* potentially dangerous substance (ammunition, chemicals, solvents, heavy metals, etc.) would have to provide separate warnings. Such a broad notion of foreseeability would lead to extreme and unfair results in a variety of contexts in which it may be foreseen, in some sense, that a defendant's product may be used with a product supplied by another. Under this approach, a "syringe manufacturer would be required to warn of the danger of any and all drugs it may be used to inject, and the manufacturer of bread [or jam] would be required to warn of peanut allergies, as a peanut butter and jelly sandwich is a foreseeable use of bread." Thomas W. Tardy, III & Laura A. Frase, *Liability of Equipment Manufacturers for Products of Another: Is Relief in Sight?*, Silica, HarrisMartin

Columns: Asbestos, May 2007, at 6. Likewise, "manufacturers of matches and lighters [would be required] to warn that smoking cigarettes is dangerous to [the smoker's] health." Petereit, *supra*, at 4. Manufacturers would be placed in the untenable position of trying to predict what other products might be used with theirs in the future or else face potential liability for injuries caused by those ancillary products.

This potentially wide-ranging exposure based on the foreseeable interactions between products would be magnified exponentially in the maritime context given the lack of a limiting principle. As the Sixth Circuit has explained, "[o]n a ship most things are connected to other things," so a claim regarding one product could readily "implicate[] a broad class of potential sources of exposure." *Stark*, 21 F. App'x at 381. The Third Circuit's rule is thus especially problematic in this context.

2. Further, if there were to be a dramatic shift in the potential liability born by defendants for third-party products, Congress—not this Court—should do so prospectively. Indeed, the consequence of the decision below would be to expand greatly the proper recoveries for seaman far beyond that contemplated by Congress. In the Jones Act, Congress enacted a federal negligence claim for seamen injured in the course of employment. 46 U.S.C. app. § 688(a). By its terms, that Act incorporates the principles of the Federal Employer's Liability Act, 45 U.S.C. § 51 *et seq.* ("FELA"), to seamen, and "consequently the entire judicially developed doctrine of liability" under FELA as well. *Kernan* v. *Am. Dredging Co.*, 355 U.S. 426, 439 (1958).

Under FELA, Congress abolished certain traditional tort defenses that had denied or restricted recoveries

for injured railroad employees, see *Norfolk S. Ry.* v. *Sorrell*, 549 U.S. 158, 166 (2007); see *Consol. Rail Corp.* v. *Gottshall*, 512 U.S. 532, 542-43 (1994). At the same time, notwithstanding its remedial purpose, FELA, and derivatively the Jones Act, is *not* a workers' compensation statute. Employers (or manufacturers) are not insurers of employees' welfare under these statutes. See *Sorrell*, 549 U.S. at 165. Thus, "[t]he basis of . . . liability is . . . negligence, not the fact that injuries occur." *Gottshall*, 512 U.S. at 543.

The unlimited nature of foreseeability-based liability, however, threatens to achieve this *precise* result by expanding the scope of negligence liability and thus converting manufacturers into the insurers of injuries caused by third-party products. *E. River S.S.*, 476 U.S. at 874 (rejecting "foreseeability" as an "inadequate brake" that could make a "manufacturer liable for vast sums"). Indeed, as discussed, such a rule "would make all manufacturers the guarantors not only of their *own* products, but also of each and every product that could conceivably be used in connection with or in the vicinity of their product." Petereit, *supra* at 4. Liability measured primarily by the depth of a defendant's pocket, which is likely how foreseeability is applied, is not a principle of tort law and certainly not of maritime law.

Where, as here, Congress has legislated, the Court "sail[s] in occupied waters," and it is "not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them." *Miles*, 498 U.S. at 36; see also, *e.g.*, *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285 (1952) (declining to adopt contribution amongst joint tortfeasors under maritime law because "the solution of this problem should await congressional action"). Instead, only Congress should

make sweeping and novel changes that threaten to upend carefully considered policy judgments and go far beyond remedies traditionally available under maritime law.

3. The expansion of negligence to encompass liability for injuries allegedly caused by exposure to products of third parties is all the more arbitrary and inefficient because manufacturers cannot control the purchaser—here, the United States Navy—which determines and installs the third-party component to be used in connection with the equipment. This is true even in circumstances in which the manufacturer "specifically directed," Pet. App. 16a, that a third-party product be used—because the manufacturer still does not control the purchaser's decision to use that product—and it is all the more true where a replacement part is concerned, especially many years down the line. In that case, the purchaser may have a newer, safer alternative to consider but, if it forgoes that alternative, the decision is the purchaser's, not the manufacturer's. Here, for example, petitioners had no way of knowing or controlling whether and for how long the Navy would use asbestos, or whether and why it would abandon asbestos in light of different available alternatives. See JA103-10, 164-66, 207-09 (Betts Decl. ¶¶ 16-17, 46, 81, 83); see also *e.g.*, *Taylor* v. *Elliott Turbomachinery Co.*, 90 Cal. Rptr. 3d 414, 439 (Ct. App. 2009) ("They delivered various parts to the Navy during World War II and had no control over the materials the Navy used with their products twenty years later when [plaintiff] was exposed to asbestos."). Those decisions were the Navy's alone. Thus, the approach of the court below would have the anomalous effect of imposing liability on a party based on the choices of the Navy, which the manufacture has no ability to control. The only rational choice for a

manufacturer faced with uncertain and unlimited liability is not to sell its products to the Navy. Obviously, national security and other federal contracting interests are ill-served by this outcome.

4. The court below attempts to justify its broad expansion of liability on the basis that maritime law pays "special solicitude" to sailor safety, and that its novel rule promotes this interest. Pet. App. 12a-13a. But, far from advancing that important interest, a test primarily based on foreseeability would, if anything, place sailors at greater risk of harm.

As an initial matter, the court below reasoned that its foreseeability test did as good a job as the traditional rule promoting "simplicity and practicality," maritime commerce, and uniformity, and that accordingly the balance weighed in favor of the foreseeability test because it would "permit a greater number of deserving sailors to receive compensation." Pet. App. 13a; see *id.* at 15a ("the special solicitude for the safety and protection of sailors is dispositive, because it counsels us to follow the standard-based approach, and none of the other principles weigh heavily in either direction"). But that is an inaccurate construct. In contrast to the bright-line rule, the foreseeability standard presents a test that is incapable of principled application, leading to uncertainty, confusion, and arbitrary outcomes, as discussed. See *supra* at 26-30. Even if there were not such a dramatic trade-off between certainty and uncertainty, however, the court's decision would *still* not be supported by the principle of promoting the safety of sailors because the Third Circuit's broad theory of liability is not solicitous of—but instead destructive of—sailor safety.

Under the Third Circuit's rule, manufacturers would be encouraged to multiply the number of warnings

that sailors receive, and warnings on ships would proliferate. See *supra* at 31-33. Indeed, if each equipment manufacturer had a duty to warn about any foreseeable downstream risk from any other manufacturer's product, hundreds of equipment manufacturers would have to provide separate warnings not only for asbestos but for explosives, solvents, radiation, lead, heavy metals and the myriad of other potentially hazardous materials on a warship. See *id.* In this context, these warnings would also be in addition to the Navy's robust system of controls and hazard warnings. See *supra* at 22-25. Accordingly, any additional warnings would either be redundant of other manufacturers' and of the Navy's instructions, or they affirmatively would contradict other manufacturers' and the Navy's instructions. Either way, such additional warnings would cause confusion and threaten sailor safety.

As both courts and experts have recognized, over-warning creates a risk of depriving users of any effective warning. See, *e.g.*, *Straley* v. *United States*, 887 F. Supp. 728, 747 (D.N.J. 1995) ("[I]t is unreasonable to impose a duty upon a manufacturer to warn of all possible dangers posed by all possible uses of a product because such 'billboard' warnings would deprive the user of an effective warning."). The proliferation of warnings threatens to frustrate and confuse users, resulting in their disregard of all warnings or failure to respond appropriately to warnings about more serious risks. Thus, numerous federal and state courts have cautioned that requiring excessive warnings "decrease[s] the effectiveness of all of the warnings," *Broussard* v. *Cont'l Oil Co.*, 433 So. 2d 354, 358 (La. Ct. App. 1983), and risks "less meaningful warnings crowding out necessary

warnings," *Dowhal* v. *SmithKline Beecham Consumer Healthcare*, 88 P.3d 1, 13 (Cal. 2004).[7]

Experts from different fields of study also acknowledge the problems of information overload and warning dilution, and emphasize the need to be "cautious to avoid imposing a duty to provide overly numerous or too detailed warnings" as "such warnings are likely to be ignored and thus ineffective." *Restatement (Third) of Torts: Prods. Liab.*, § 2, cmt. f (Tentative Draft No. 1, 1994). Indeed, a wide range of literature from different fields of study confirms that over-warning obscures rather than elucidates.[8]

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[7] *See also, e.g., Cotton* v. *Buckeye Gas Prods. Co.*, 840 F.2d 935, 938 (D.C. Cir. 1988) ("The inclusion of each extra item dilutes the punch of every other item."); *Mason* v. *SmithKline Beecham Corp.* 596 F.3d 387, 392 (7th Cir. 2010) ("overwarning can deter potentially beneficial uses of the drug by making it seem riskier than warranted and can dilute the effectiveness of valid warnings"); *Thomas* v. *Hoffman-LaRoche, Inc.*, 949 F.2d 806, 816 n.40 (5th Cir. 1992) ("If manufacturers so respond to the possibility of liability [by issuing excessive warnings], physicians will begin to ignore or discount the warnings provided by the drug manufacturers."); *Liriano* v. *Hobart Corp.*, 700 N.E.2d 303, 308 (N.Y. 1998) ("[r]equiring too many warnings trivializes and undermines the entire purpose of the rule, drowning out cautions against latent dangers of which a user might not otherwise be aware" and "would neutralize the effectiveness of warnings"); *Dunn* v. *Lederele Labs.*, 328 N.W.2d 576, 581 (Mich. Ct. App. 1982) ("[w]arnings, in order to be effective, must be selective"); *Aetna Cas. & Sur. Co.* v. *Ralph Wilson Plastics Co.*, 509 N.W.2d 520, 523 (Mich. Ct. App. 1993) (per curiam) ("excessive warnings on product labels may be counterproductive, causing 'sensory overload' that literally drowns crucial information in a sea of mind-numbing detail").

[8] *See, e.g.*, Thomas J. Ayres et al., *What is a Warning and When Will It Work?*, Proceedings of the Human Factors Society 33d Annual Meeting 426, 429 (1989) ("[c]onstant exposure to excessive, unnecessary warnings can be expected to produce habituation" and "[w]idespread use of warnings probably reduces

The Third Circuit's broad expansion of liability would thus have the perverse effect of *endangering* sailors: Sailors would be bombarded with duplicative and unnecessary information, neutralizing the effectiveness of the warnings they had already received, and placing them in greater danger than before. And the problem of confusion would only be compounded if a manufacturer's new warnings were to actually *conflict* with other manufacturers' or the Navy's. In that instance, the "many varied warnings may not deliver the desired information to users," and would further increase the risk to sailors. *Brooks* v. *Howmedica, Inc.*, 273 F.3d 785, 796 (8th Cir. 2001) (en banc).

Indeed, in the context of this case, any such warning, if followed, would only have encouraged the

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their potential effectiveness by decreasing their prominence"); Barry H. Kantowitz & Robert D. Sorkin, *Human Factors: Understanding People-System Relationships* 634 (1983) ("From a human factors perspective, excessive warnings are as bad as insufficient warnings [because] [p]eople become accustomed to the warnings and tend to ignore them. Warnings should be reserved for high-probability events."); Richard M. Cooper, *Drug Labeling and Products Liability: The Role of the Food and Drug Administration*, 41 Food Drug Cosm. L.J. 233, 237-38 (1986) (noting that physicians have little time to refer to labeling, and information overload may lead them to ignore warnings); James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. Rev. 265, 296-97 (1990) ("Bombarded with nearly useless warnings about risks that rarely materialize in harm, many consumers could be expected to give up on warnings altogether."); Michael D. Green, *When Toxic Worlds Collide: Regulatory and Common Law Prescriptions for Risk Communication*, 13 Harv. Envtl. L. Rev. 209, 223 (1989) ("Much like the little boy who cried wolf, myriad warnings that surround everyone and often call attention to trivial or well-known risks tend to reduce the attention that is paid to all warnings, thereby reducing their overall effectiveness.").

violation of Navy regulations and orders, a notion completely inconsistent with the Navy's complete command and control necessary to fulfill its mission. In fact, there is nothing in the Third Circuit's opinion that supports its presumption that inundating sailors with redundant or contradictory information will somehow improve sailor safety. See *supra* 12. The opinion is devoid of any discussion of how the imposition of such a new duty decades after the conduct and the Navy's cessation of the use of asbestos would have provided sailors with any ability to have prevented disease.

C. The Decision Below Raises Substantial Fairness Concerns.

In addition to undermining core objectives of maritime law, the imposition of expanded liability in this case would raise fundamental fairness concerns as it would disrupt settled expectations and impose substantial liability based on events that occurred more than half a century ago in a highly regulated military setting. These considerations provide additional reason to hew to established tort-law and maritime principles.

1. In *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), this Court considered a statute that required certain coal mining employers to retroactively provide significant benefits to workers it had employed decades earlier. While the plurality disagreed over the appropriate analytical framework, a majority of Justices agreed that the substantial retroactive imposition of liability, "based on the employers' conduct far in the past," when they "could not have anticipated the liability," implicates "fundamental principles of fairness" that rendered the statute unconstitutional under either the Takings or Due Process Clause. *Id.* at 528-29, 537 (O'Connor, J.)

(analyzing fairness of retroactivity under the Takings Clause); see also *id.* at 549 (Kennedy, J.) (concurring in judgment) ("creating liability for events which occurred 35 years ago [resulted in] retroactive effect of unprecedented scope" violating Due Process).

While a certain element of retroactivity may always be inherent in the development of the common law, fairness concerns are particularly salient in this case. As with the retroactive liability rejected in *Eastern Enterprises*, a dramatic deviation from traditional tort and maritime principles in this case would impose substantial retroactive liability on manufacturers such as GE based on the delivery of equipment that occurred more than 70 years ago, under strict Navy oversight, when they could not possibly have anticipated or mitigated such liability. Any warning manufacturers might have succeeded in affixing to its equipment in 1945 would necessarily have been obsolete by the time sailors later worked near the machinery, particularly given intervening changes in protective measures.

2. There is also no reason to believe that the Navy would even have permitted warnings on top of its own detailed and comprehensive hazard communication program. See *supra* at 7-8. Indeed, the Navy had rejected an offer in the late 1940s by several of its asbestos-containing insulation suppliers to provide "a brief statement of precautions which should be taken in the light of their own experience," preferring instead to use the Navy's existing specifications. JA76 (Report of Samuel A. Forman ¶ 72). There is no evidence that the Navy would have permitted additional warnings by manufacturers—let alone GE specifically.

In any event, even if a perfectly adequate warning had somehow been given, it would have made no difference. Such a warning would either have been the

same as the warning provided by the Navy, or contrary to the Navy's warning. In the former case, the warning would have been at best duplicative and unnecessary (at worst it would have diluted the effectiveness of the Navy's warning). See *supra* at 37-40. In the latter case, a conflicting warning would have purported to authorize sailors to disobey the Navy's instructions and is certain to have been disregarded. It would be deeply unfair to predicate the imposition of enormous retroactive liability on the ahistorical and fictitious proposition that sailors should nonetheless have been provided alternative warnings so they could arrive at their own, individualized conclusions as to how best to address one particular hazard in an environment filled with life-threatening hazards.

The unfairness of expanded liability is compounded here because it would shift liability away from those responsible for actually causing injury in search of a deeper pocket. Plaintiffs typically have various avenues of recovery against the actual makers of the asbestos products that they contend caused injury. Indeed, many former asbestos makers "have emerged from the [federal] bankruptcy process leaving in their place dozens of trusts funded with tens of billions in assets to pay claims." Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation & Governance*, 12 Mealey's Asbestos Bankr. Rep. 33, 33-34 (June 2013). "These trusts answer for the tort liabilities of the great majority of the historically most-culpable large manufacturers that exited the tort system through bankruptcy over the past several decades." William P. Shelley et al., *The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update—Judicial and Legislative*

Developments and Other Changes in the Landscape Since 2008, 23 Widener L.J. 675, 675-76 (2014).[9]

3. To be sure, plaintiffs have no claim against the Navy directly, see *Feres* v. *United States*, 340 U.S. 135 (1950), but they may seek compensation for asbestos-related injuries arising as a result of Navy service. Specifically, plaintiffs may seek recovery from the Department of Veterans Affairs "[f]or disability resulting from personal injury suffered or disease contracted in [the] line of duty." 38 U.S.C. § 1131; see *id.* § 1110 (same for "disability resulting from personal injury suffered or disease contracted in line of duty . . . during a period of war"); *id.* § 1310 (surviving spouse may receive compensation upon death of a veteran due to a service-connected disability). Indeed, under federal regulations, an "entitlement for a veteran exists if the veteran is disabled as the result of a personal injury or disease . . . while in active service if the injury or the disease was incurred or aggravated in line of duty." 38 C.F.R. § 3.4(b)(1).[10]

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[9] Apparently "[n]ot content with the remedies available through bankruptcy trusts and state and federal worker compensation programs, claimants' lawyers have extended the reach of products liability law to 'ever-more peripheral Defendants,'" Paul J. Riehle et al., *Product Liability for Third Party Replacement or Connected Parts: Changing Tides from the West*, 44 U.S.F. L. Rev. 33, 38 (2009) (quoting Alan Calnan & Byron G. Stier, *Perspectives on Asbestos Litigation: Overview and Preview*, 37 Sw. U. L. Rev. 459, 463 (2008)), and "seek to impose liability on solvent manufacturers for harms caused by products they never made or sold." Victor E. Schwartz, *A Letter to the Nation's Trial Judges: Asbestos Litigation, Major Progress Made Over the Past Decade and Hurdles You Can Vault in the Next*, 36 Am. J. of Trial Advoc. 1, 24-25 (2012).

[10] *See Ennis* v. *Brown*, 4 Vet. App. 523, 527 (1993) (noting that the VA has acknowledged that a relationship exists between asbestos exposure and the development of certain diseases, which

Given these available avenues of recovery, it would be improper and unnecessary to adopt a novel, limitless standard that would disrupt the settled expectations of defendants who are in no proper sense culpable for plaintiffs' injuries. The Court should reject the Third Circuit's attempt to use foreseeability as a thin disguise for allowing plaintiffs simply to access deep pockets of defendant manufacturers that had nothing to do with the plaintiffs' injuries and had no way to prevent them.

CONCLUSION

For these reasons, the judgment of the Third Circuit should be reversed.

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may occur 10 to 45 years after exposure); Dep't of Veterans Benefits, Veterans' Admin., DVB Circular 21-88-8, *Asbestos-Related Diseases* (May 11, 1988) (providing guidelines for considering compensation claims based on exposure to asbestos).